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Attorneys for Plaintiff United States of America

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

PACIFIC GAS and ELECTRIC COMPANY

Defendant.

CV

09

4503

Civil Action No. \_\_\_\_\_

COMPLAINT

The United States of America, by authority of the Attorney General of the United States  
and through the undersigned attorneys, acting at the request of the Administrator of the United

COMPLAINT

FILED

SEP 24 PM 12:55

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

MCG  
N/P

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EMC

1 States Environmental Protection Agency ("EPA"), alleges as follows:

2 NATURE OF THE ACTION

3 1. This is a civil action brought against Pacific Gas and Electric Company  
4 ("PG&E") pursuant to Sections 113(b)(2) and 167 of the Clean Air Act ("the Act"), 42 U.S.C.  
5 §§ 7413(b)(2) and 7477, for injunctive relief and the assessment of civil penalties for violations  
6 of the Prevention of Significant Deterioration ("PSD") provisions of the Act, 42 U.S.C. § 7470-  
7 92.  
8

9 2. As set forth more fully herein, PG&E constructed the Gateway  
10 Generating Station ("GGS"), a natural gas-fired power plant in Antioch, California, without first  
11 obtaining an appropriate PSD permit authorizing this construction and without installing  
12 appropriate technology to control emissions of nitrogen oxides and carbon monoxide, as  
13 required by the Act and the Act's implementing regulations.  
14

15 3. As a result of the Defendant's operation of the GGS following this  
16 unlawful construction, in the absence of appropriate controls, excess amounts of nitrogen oxides  
17 and carbon monoxide have been and are still being released into the atmosphere.  
18

19 JURISDICTION

20 4. This Court has jurisdiction of the subject matter of this action pursuant to  
21 Sections 113(b) and 167 of the Act, 42 U.S.C. §§ 7413(b) and 7477, and pursuant to 28 U.S.C.  
22 §§ 1331, 1345, and 1355.  
23

24 VENUE

25 5. Venue is proper in this District pursuant to Section 113 of the Act, 42  
26 U.S.C. § 7413, and 28 U.S.C. §§ 1391(b) and (c), and 1395(a), because the Defendant either  
27

1 resides, has its principal place of business, or committed violations in this District, and because  
2 the facility that is the subject of this Complaint is located within in this District.

### 3 INTRADISTRICT ASSIGNMENT

4  
5 6. Intradistrict assignment is proper in the San Francisco Division pursuant  
6 to Civil L.R. 3-2 because the events and omissions giving rise to this Complaint occurred in  
7 Contra Costa County. Civil L.R. 3-2(d) provides that, except as provided in Civil L.R. 3-2(c),  
8 all civil actions which arise in the counties of Alameda, Contra Costa, Del Norte, Humboldt,  
9 Lake, Marin, Mendocino, Napa, San Francisco, San Mateo, or Sonoma shall be assigned to the  
10 San Francisco Division or the Oakland Division.

### 11 NOTICES

12  
13 7. EPA issued the Defendant a Notice of Violation on August 13, 2009  
14 pursuant to Section 113(a)(1) of the Act, 42 U.S.C. § 7413(a)(1). Commencement of this civil  
15 action is authorized by Section 113(b) of the Act, 42 U.S.C. § 7413(b).

### 16 DEFENDANT

17  
18 8. Defendant PG&E is a California corporation, with its principal place of  
19 business in California, that owns and operates the GGS.

20 9. Defendant is a "person" within the meaning of Section 302(e) of the Act,  
21 42 U.S.C. § 7602(e).

### 22 STATUTORY AND REGULATORY BACKGROUND

23  
24 10. The Clean Air Act is designed to protect and enhance the quality of the  
25 Nation's air so as to promote the public health and welfare and the productive capacity of its  
26 population. 42 U.S.C. § 7401(b)(1).

11. Section 108(a) of the Act, 42 U.S.C. § 7408(a), requires the Administrator of EPA to identify and prepare air quality criteria for each air pollutant which may endanger public health and welfare when emitted, and which results from numerous or diverse mobile or stationary sources. For each such “criteria” pollutant, Section 109 of the Act, 42 U.S.C. § 7409, requires the Administrator to promulgate National Ambient Air Quality Standards (“NAAQS”) requisite to protect public health and welfare. Pursuant to Sections 108 and 109, EPA has identified and promulgated NAAQS for NO<sub>2</sub> (nitrogen dioxide), ozone, and carbon monoxide as such pollutants. 40 C.F.R. §§ 50.8 - 50.11.

12. Under Section 107(d) of the Act, 42 U.S.C. § 7407(d), each state is required to designate those areas within its boundaries where the air quality is better or worse than the NAAQS for each criteria pollutant, or where the air quality cannot be classified due to insufficient data. An area that meets the NAAQS for a particular pollutant is termed an “attainment” area. An area that does not meet the NAAQS is termed a “nonattainment” area. An area that cannot be classified due to insufficient data is termed “unclassifiable.”

13. At times relevant to this Complaint, GGS was located in Antioch, California which is classified as in attainment for nitrogen dioxide and carbon monoxide. The same area was classified as non-attainment for ozone.

14. Part C of Title I of the Act, 42 U.S.C. §§ 7470-7492, sets forth requirements for the prevention of significant deterioration (“PSD”) of air quality in those areas designated as either attainment or unclassifiable for purposes of meeting the NAAQS standards. These requirements are designed to protect public health and welfare, to assure that economic growth will occur in a manner consistent with the preservation of existing clean air resources,

1 and to assure that any decision to permit increased air pollution is made only after careful  
2 evaluation of all the consequences of such a decision and after public participation in the  
3 decision making process. These provisions are referred to herein collectively as the “PSD  
4 program.”  
5

6 15. Sections 110(a)(2)(C) and 161 of the Act, 42 U.S.C. §§ 7410(a)(2)(C) and  
7 7471, require each state to adopt a state implementation plan (“SIP”) that contains emissions  
8 limitations and such other measures as may be necessary to prevent significant deterioration of  
9 air quality in areas that have been designated as either in attainment with NAAQS or  
10 unclassifiable.  
11

12 16. In 1978, EPA promulgated the Federal PSD regulations set forth at 40  
13 C.F.R. § 52.21 and incorporated these regulations into all SIPs nationwide. See 40 Fed. Reg.  
14 26403 (1978). If it so chooses, a state may promulgate its own PSD regulations, which must be  
15 at least as stringent as those set forth at 40 C.F.R. § 52.166. If EPA finds the state PSD  
16 regulations to be adequate, it may approve those regulations into the SIP as a replacement for 40  
17 C.F.R. § 52.21. In lieu of promulgating its own PSD regulations, a state may request delegation  
18 of the Federal PSD regulations pursuant to 40 C.F.R. § 52.21(u). Such a delegation allows the  
19 state to implement 40 C.F.R. § 52.21 on behalf of EPA.  
20  
21

22 17. On or about April 23, 1986, EPA delegated the administration of the  
23 Federal PSD program as set forth in the SIP to the Bay Area Air Quality Management District  
24 (“BAAQMD”).

25 18. As set forth at 40 C.F.R. § 52.21(a)(2)(iii), before any “major stationary  
26 source” may be constructed in an attainment or unclassifiable area, a PSD permit must first be  
27  
28

1 obtained.

2 19. Under the applicable SIP and PSD program, a “major stationary source” is  
3 defined to include fossil-fuel-fired steam electric plants of more than 250 million British thermal  
4 units (Btu) per hour heat input which emit or have the potential to emit one hundred tons per  
5 year or more of any regulated air pollutant. 40 C.F.R. § 52.21(b)(1)(i)(a).  
6

7 20. Under the applicable SIP, and as set forth at 42 U.S.C. § 7475(a)(4), a  
8 newly constructed major stationary source must, *inter alia*, install and operate the best available  
9 control technology (“BACT”), as defined in 42 U.S.C. § 7479(3).  
10

#### 11 CLEAN AIR ACT ENFORCEMENT PROVISIONS

12 21. Section 113(a)(1) of the Act, 42 U.S.C. § 7413(a)(1), provides that:

13 Whenever, on the basis of any information available to the  
14 Administrator, the Administrator finds that any person has violated or is  
15 in violation of any requirement or prohibition of an applicable  
16 implementation plan or permit, the Administrator shall notify the person  
17 and the State in which the plan applies of such finding. At any time after  
the expiration of 30 days following the date on which the notice of  
violation is issued, the Administrator may . . .

18 \* \* \*

19 (C) bring a civil action in accordance with subsection (b) of this section.

20 22. Section 113(a)(3) of the Act, 42 U.S.C. § 7413(a)(3), provides that:

21 “except for a requirement or prohibition enforceable under the  
22 preceding provisions of this subsection, whenever, on the basis of  
23 any information available to the Administrator, the Administrator  
24 finds that any person has violated, or is in violation of, any other  
25 requirement or prohibition of this subchapter . . . including, but  
26 not limited to, a requirement or prohibition of any rule, plan,  
order, waiver, or permit promulgated, issued or approved under  
those provisions or titles . . . the Administrator may . . . bring a  
civil action in accordance with subsection (b) of this section . . .”



23. Section 113(b)(1) of the Act, 42 U.S.C. § 7413(b)(1), and 40 C.F.R. § 52.23 authorize the Administrator to initiate a judicial enforcement action for a permanent or temporary injunction, and/or for a civil penalty of up to \$25,000 per day of violation for violations occurring before January 30, 1997; up to \$27,500 per day for each such violation occurring between January 30, 1997 and March 15, 2004; up to \$32,500 per day for each such violation occurring between March 15, 2004 and January 9, 2009; and up to \$37,500 per day for each such violation occurring after January 9, 2009 pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, against any person whenever such person has violated, or is in violation of, any requirement or prohibition of an applicable implementation plan.

24. Section 113(b)(2) of the Act, 42 U.S.C. § 7413(b)(2), authorizes the Administrator to initiate a judicial enforcement action for a permanent or temporary injunction, and/or for a civil penalty of up to \$25,000 per day of violation for violations occurring before January 30, 1997, up to \$27,500 per day for each such violation occurring between January 30, 1997 and March 15, 2004; up to \$32,500 per day for each such violation occurring between March 15, 2004 and January 9, 2009; and up to \$37,500 per day for each such violation occurring after January 9, 2009, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701, against any person whenever such person has violated, or is in violation of, requirements of the Act other than those specified in Section 113(b)(1), 42 U.S.C. § 7413(b)(1), including violations of Section 165(a), 42 U.S.C. § 7475(a), and Section 111, 42 U.S.C. § 7411.

1           25.     Section 167 of the Act, 42 U.S.C. § 7477, authorizes the Administrator to  
2 initiate an action for injunctive relief, as necessary, to prevent the construction, modification or  
3 operation of a major emitting facility which does not conform to PSD requirements.  
4

5                           GENERAL ALLEGATIONS

6           26.     On July 24, 2001, BAAQMD issued an Authority to Construct and PSD  
7 permit authorizing the construction of the GGS in Antioch, California. This authorization was  
8 granted to Mirant Delta, LLC ("Mirant").  
9

10           27.     In or around February 2002, Mirant ceased construction of the GGS and  
11 this cessation of construction lasted more than 18 months.

12           28.     On March 3, 2003, EPA withdrew from BAAQMD the delegation of  
13 authority to administer the PSD program within the jurisdictional boundaries of the BAAQMD,  
14 which includes the location of the GGS.  
15

16           29.     After March 3, 2003, and for the remainder of the 18 month period after  
17 Mirant ceased construction of the GGS, EPA was the only entity authorized to administer and  
18 issue permits under the PSD Program to construct facilities within the jurisdictional boundaries  
19 of the BAAQMD, which includes the location of the GGS. The federal regulations set forth at  
20 40 C.F.R. § 52.21 supplied the applicable legal requirements governing permits for such  
21 construction.  
22

23           30.     In July 2003, during the time Mirant had ceased construction of the GGS,  
24 Mirant requested that BAAQMD grant an extension of Mirant's PSD permit. BAAQMD  
25 purported to grant this extension.

26           31.     At the time BAAQMD purported to grant Mirant's extension request,  
27  
28



1 BAAQMD's authority to administer the PSD program had been rescinded.

2 32. At the time of Mirant's extension request, EPA was the sole permitting  
3 authority for the PSD program within the jurisdictional boundaries of the BAAQMD, and  
4 federal regulations governed the administration of PSD permits.  
5

6 33. Pursuant to 40 C.F.R. § 52.21(r)(2): "Approval to construct shall become  
7 invalid if construction is not commenced within 18 months after receipt of such approval, if  
8 construction is discontinued for a period of 18 months or more, or if construction is not  
9 completed within a reasonable time."  
10

11 34. BAAQMD lacked the authority to extend Mirant's PSD permit in 2003  
12 because BAAQMD's authority to administer the PSD program had been rescinded.

13 35. Pursuant to 40 C.F.R. § 52.21(r)(2), Mirant's PSD permit for the GGS  
14 expired in or about August 2003 because more than 18 months had elapsed since construction of  
15 the GGS had ceased.  
16

17 36. BAAQMD purported to transfer Mirant's Authority to Construct and PSD  
18 permit to PG&E in early 2007. At the time of the purported transfer, the PSD permit had  
19 expired and was legally ineffective.  
20

#### 21 CLAIM FOR RELIEF

22 37. Paragraphs 1 through 36 are hereby incorporated by reference.

23 38. PG&E constructed the GGS, which is a major emitting facility, without  
24 first obtaining an appropriate PSD permit in violation of Section 165(a)(1) of the Act, 42 U.S.C.  
25 § 7475(a)(1), and 40 C.F.R. § 52.21.

26 39. PG&E is operating the GGS without an appropriate permit that applies  
27  
28

1 BACT in violation of Section 165(a)(1) of the Act, 42 U.S.C. § 7475(a)(1).

2 40. Pursuant to Section 7413(b) of the Act, 42 U.S.C. § 7413(b), PG&E is  
3 liable for injunctive relief and appropriate civil penalties for each day of its continued operation  
4 of the GGS in violation of the Act.  
5

6 PRAYER FOR RELIEF

7 WHEREFORE, based upon all the allegations contained in this Complaint, the United  
8 States of America requests that this Court:

9 1. Permanently enjoin Defendant PG&E from operating the Gateway  
10 Generating Station except in accordance with the Clean Air Act and any applicable regulatory  
11 requirements.  
12

13 2. Order Defendant PG&E to remedy its past violations by, *inter alia*,  
14 requiring PG&E to apply for all necessary permits in conformity with the requirements of the  
15 PSD provisions of the Act.  
16

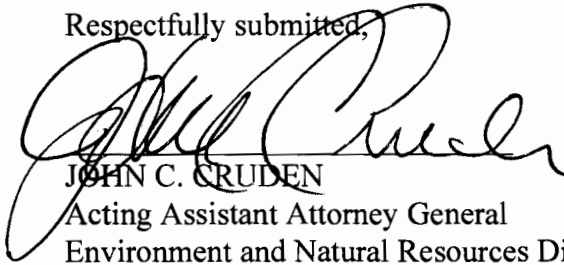
17 3. Order Defendant PG&E to remedy its past violations by, *inter alia*,  
18 requiring Defendant to install, as appropriate, the best available control technology at the GGS  
19 for each pollutant subject to regulation under the Act, and to take such other measures as are  
20 necessary to bring the Gateway Generating Station into compliance with the PSD provisions of  
21 the Act.  
22

23 4. Assess an appropriate civil penalty against Defendant PG&E.

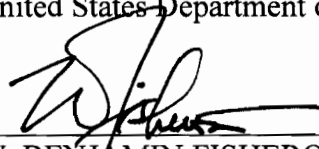
24 5. Award Plaintiff its costs in this action.  
25  
26  
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1 6. Grant such other relief as the Court deems just and proper.

2 Respectfully submitted,

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4  
5

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